U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 18Jun2002

CASE NO. 2001-LHC-01718

OWCP NO. 01-143775

In the Matter of

DAVID F. KENNY
Claimant

v.

CASHMAN/KPA
Employer

and

NATIONAL UNION FIRE INSURANCE COMPANY
(AIG CLAIM SERVICES, INC.)
Carrier

Appearances:

David J. Berg, Esquire (Latti & Anderson),
Boston, Massachusetts, for the Claimant

Michael P. Sams, Esquire (Sherin & Lodgen),
Boston, Massachusetts, for the Employer and Carrier

Before: Daniel F. Sutton
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

I. Statement of the Case

This proceeding arises from a claim for worker's compensation benefits filed by David F. Kenny against Cashman/KPA (the Employer), under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et seq*. (the Act). In his claim, Kenny alleges that he sustained a work-related injury on August 21, 1998 while working for the Employer and that this injury has resulted in disability.

The current proceeding represents the second time that this case has been before an administrative law judge. The case initially was before Judge Rudolf L. Jansen who issued a decision and order awarding benefits to the Claimant on December 7, 1999. *Kenny v. J.M. Cashman, Inc.*, Case No. 1999-LHC-01853 (1999). The Employer stipulated before Judge Jansen that the Claimant sustained an injury on April 21, 1998 which arose out of and in the course of his employment. Decision and Order at 8. Judge Jansen determined that the stipulation was sufficient to invoke the Act's section 20(a) presumption that the Claimant's injury arose out of his employment, and he found that the Employer had not presented substantial countervailing evidence to rebut the presumption. In this regard, Judge Jansen found the Claimant's statement that he did not have back problems prior to April 21, 1998 to be credible despite testimony that he had seen chiropractors in the past. Judge Jansen also considered the conflicting medical evidence, including the opinions from Drs. Doppelt and Wyman, and noting that under the aggravation rule, if a claimant's work plays any role in the manifestation of an underlying medical condition, the entire resulting disability is compensable, he concluded that the evidence at most established that "the accident on April 21, 1998 brought the Claimant's pre-existing degenerative arthritis into disabling reality." Decision and Order at 10. Judge Jansen further found that the Claimant's work-related back injury prevented him from returning to his usual employment as a pile driver superintendent. Decision and Order at 11-12. Noting that the Employer had not demonstrated the existence of realistically available job opportunities which the Claimant was capable of performing, Judge Jansen further found that the Claimant was totally disabled and that his disability was temporary in nature as medical opinions of record all concurred that he was not at a point of medical end result. *Id.* at 12-13. Based on these findings, Judge Jansen ordered the Employer and its insurance carrier to pay the Claimant temporary total disability compensation from April 21, 1998 to the present based on an average weekly wage of $2,378.00 and to furnish the Claimant with reasonable, appropriate, and necessary medical care for the Claimant's work-related injuries. *Id*. at 14.

In the present proceeding, the Claimant now seeks permanent and total disability benefits or, alternatively, permanent partial disability. Administrative Law Judge Exhibit ("ALJX") 1; Hearing Transcript at 12.[1] After an informal conference before the District Director of the Department of Labor's Office of Workers' Compensation Programs (OWCP), the matter was referred to the Office of Administrative Law Judges for a formal hearing which was conducted in Boston, Massachusetts on August 2, 2001, at which time all parties were given the opportunity to present evidence and oral argument. The Claimant appeared at the hearing represented by counsel, and an appearance was made by counsel on behalf of the Employer and its insurance carrier, National Union Fire Insurance Company (the Carrier). The Claimant and a private investigator called by the Employer testified at the hearing, and documentary evidence was

[1] Documentary evidence will be referred to herein as "CX" for an exhibit offered by the Claimant, "EX" for an exhibit offered by the Employer, and "ALJX" for the formal papers. References to the transcript of the first hearing before Judge Jansen will be designated as "TRI" and "TRII" will be used to designate the transcript of the second hearing.

admitted as Claimant's Exhibits CX 1-10 and Employer's Exhibits EX 1, 2A, 3-20, 24-25, 27-28.[2] At the close of the hearing, the record was held open for 14 days to allow the Employer to schedule depositions of Drs. Doppelt and D'Alton. In addition, the parties' request for additional leave to file written closing argument was granted. By letter dated August 7, 2001, counsel to the Employer advised that he did not intend to depose Dr. D'Alton and instead requested that the Court read the entire transcript of Dr. D'Alton's testimony in a related third party action which had been admitted into the record as Claimant's Exhibit CX 10.[3] By letter dated August 17, 2001, counsel to the Claimant notified the Court that the Employer had further advised that he would not seek to depose Dr. Doppelt, and the parties agreed to simultaneously file closing argument on September 19, 2001. Both parties timely submitted their closing argument, and the record is now closed.

After careful analysis of the evidence contained in the record I have concluded that THE Claimant has established that he is entitled to permanent total disability compensation, medical benefits and attorney's fees. My findings of fact and conclusions of law are set forth below.

II. Rulings on Evidentiary Issues

The Claimant's objections to Employer's Exhibits 2B and 26 were taken under advisement at the hearing. Upon further review of the matter, I have decided that both exhibits should be admitted.

A. Exhibit 2B - The "Condensed" Surveillance Videotape

The Employer offered two versions of a surveillance videotape which was taken at the Claimant's residence in February 2000, an "original" in 8 mm format which was admitted without objection as EX 2A, and a "copy" in VHS format which was offered as EX 2B.[4] TR 178. The Employer's private investigator who conducted the videotaping testified that the VHS copy, portions of which were viewed at the hearing, differs in length from the 8 mm original because he deleted "dead time where nothing is happening on the video." TR 179. Thus, he described EX 2B as a "condensed version" of EX 2A. TR 180. The Claimant objected to EX 2B on best

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[2] The Claimant's objections to the admission of Employer's Exhibits EX 2B and 26 were taken under advisement. The Employer withdrew its offer of Exhibits EX 21-23.

[3] The third party action was tried in the United States District Court for the District of Massachusetts in April 2001. *Kenny v. Bechtel Corp.*, No. 99-10964. Section 33 of the Longshore permits an individual entitled to compensation to sue a third party for damages. 33 U.S.C. §933(a); *Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459, 466 (1968).

[4] Two additional videotapes offered by the Employer were admitted without objection as EX 1 and EX 3. TRII 173-77.

evidence grounds, asserting that it is less reliable than EX 2A, the original, since it had been altered. TR 180-81.

Section 23(a) of the Act provides that common law or statutory rules of evidence are not binding on an ALJ. 33 U.S.C. §923(a). *See also Casey v. Georgetown Univ. Med. Ctr*., 31 BRBS 147, 151-52 (1997) (ALJ has greater discretion in admitting expert evidence than district courts which are bound by Rule 702 of the Federal Rules of Evidence and the Supreme Court's decision in *Daubert v. Merrill Dow Pharmaceuticals*, 509 U.S. 579 (1993)); *Sprague v. Director, OWCP*, 688 F.2d 862, 869 n.16 ("nothing in either the Act or the regulations promulgated pursuant to the Act indicates that the Federal Rules of Civil Procedure . . . apply to compensation proceedings). Further, the implementing regulations provide that an ALJ must receive into evidence all relevant and material testimony and documents; 20 C.F.R. §702.338; *Williams v. Marine Terminals Corp.*, 14 BRBS 728, 732 (1981); and surveillance films are clearly relevant in claims under the Act where extent of disability is in issue. *Walker v. Newport News Shipbuilding and Dry Dock Co.*, 10 BRBS 101, 105 (1979), *aff'd*, 618 F.2d 107 (4th Cir. 1980), *cert. denied*, 446 U.S. 943 (1980). Having cleared the relevancy hurdle, and noting that the Claimant does not challenge the authenticity of the "condensed" videotape, I conclude that it should be admitted. *See generally Reed v. Tiffen Motor Homes, Inc*., 697 F.2d 1192, 1199 (4th Cir. 1982) (trial judge did not err in admitting photographic evidence where proper foundation for admission had been laid, and objection as to the relative probative value of such evidence goes to the weight of the evidence and not its admissibility). Therefore, the Claimant's objection is overruled, and EX 2B is admitted. In admitting the condensed copy of the surveillance videotape, however, I will take into consideration the Claimant's argument that the "best" evidence of what activities he engaged in while under surveillance is EX 2A which has not been edited or condensed.

B. EX 26 - "The Employer/Insurer's Designation of David Kenny's Testimony"

This document is a collection of pages excerpted from the transcripts of the Claimant's prior testimony at the hearing before Judge Jansen, at a pre-hearing deposition and at the trial conducted before the District Court in April 2001 on the Claimant's third party civil action. In essence, the Employer offered the transcript as admissions of a party opponent; TR 167; and the Claimant objected to its admission on the grounds that it is hearsay, cumulative and, possibly, irrelevant. TR 164-68. I took the matter under advisement and directed the parties to address the admissibility of EX 26 in their written closing arguments. TR 166, 168. Though neither party addressed the matter further, I will not treat their silence as a withdrawal of either the offer or objection.

Section 18.23 of the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, which governs the use of depositions at hearings, in pertinent part states,

> (a) *Generally*. At the hearing, all or any part of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or

represented at the taking of the deposition or who had due notice thereof in accordance with any one of the following provisions:

* * * * *

(3) The deposition of a party may be used by any other party for any purpose.

29 C.F.R. §18.23(a). In my view, this plain and unambiguous language directly answers the question of EX 26's admissibility. Accordingly, the Claimant's objection is overruled, and EX 26 is admitted.

III. Summary of the Evidence

A. The Claimant's Testimony

The Claimant testified at the first hearing before Judge Jansen he was then a fifty-six year old who had attended high school and community college without obtaining a degree or diploma. TRI 25-6. He served one year in the U.S. Army and received an honorable discharge. TRI 26. After his discharge from the Army, he performed carpentry work and eventually became a union pile driver in January 1966. TRI 26-27. For the next 32 years, the Claimant worked his way up in the pile driving hierarchy, becoming an foreman and eventually a superintendent, the position he held at the time of the April 21, 1998 accident. TRI 27-28. He stated that a pile driver engages in a variety of activities including carpentry, deep sea diving and concrete pouring which require alertness, strength, agility and an ability to climb and work on rough terrain. TRI 28. Although he was a superintendent, the Claimant testified that he worked with his crew and was required to climb and assist in lifting heavy equipment and oxygen bottles weighing as much as 125 to 140 pounds. TRI 28-30. He also wrote reports and tracked the work that his crew was performing. TRI 31. About ten years prior to the April 21, 1998 accident, the Claimant testified that had gone through a phase where, like Hercules, he "was trying to pick the world up" and that "for probably a couple of years I was going to chiropractors to constantly get muscle pulls taken out of my back." TRI 32.

On April 21, 1998, the Claimant was working for the Employer on the construction of a new pier on Spectacle Island in Boston Harbor. TRI 38. Immediately prior to the accident, he was engaged in chaining together large tires which were to be used as a fender for the pier. TRI 39. In the course of this activity, he sat on one of the tires while attempting to unhook it from a chain, and he instructed a crane operator to lower the tire. TRI 40. As the operator was lowering the tire, the load came loose, and the Claimant was "squashed" against the pier with his head nearly driven through the tire. TRI 40. He said that his body was bent into an extreme position with his legs up in his face, and he felt pain all over his body. TRI 41. The Employer's safety officer asked the Claimant if he wanted an ambulance, and he responded that he wished to be taken to Jordan Hospital. TRI 42. He testified that he was advised at Jordan Hospital to see an orthopedic specialist. TRI 42.

The Claimant testified that he then saw Dr. Samuel H. Doppelt after receiving an orthopedic referral from his family physician. TRI 43-44. He stated that he could not straighten his back and had pain in his lower back, right side, right leg and right hip, and difficulty sleeping due to pain when he first saw Dr. Doppelt. TRI 48. He said that Dr. Doppelt provided him with two braces, an elastic brace which applied pressure to his spine to be worn most of the day and an aluminum brace to keep his spine straight when engaging in activity. TRI 50-51. The Claimant stated that his pain has persisted since he began treating with Dr. Doppelt, but it had been more controlled. TRI 51.

At the time of the first hearing, the Claimant was still taking sleeping and pain pills. TRI 52. He testified that his pain worsened with activity, especially lateral movement, walking on uneven surfaces and climbing, and he stated that activities such as vacuuming or mowing the lawn aggravated his pain. TRI 52-54. The Claimant stated that he took sleeping medication when his pain was aggravated by movement, but the pain would remain for approximately one day. TRI 54. He testified that had not lifted anything heavier than a three gallon container of water since his injury and that his inability to concentrate because of pain prevented him from returning to his job as a pile driver superintendent. TRI 53. The Claimant also testified regarding an incident when, subsequent to the April 21, 1998 accident, he was in his swimming pool with his 240 pound grandson and experienced a sudden onset of pain in his back after being grabbed by the grandson. He described this pain as sharp and similar to the pain that he was experiencing at the time of the first hearing. TRI 79-81.

At the second hearing, the Claimant testified that he had seen a total of three chiropractors before the April 21, 1998 accident for "muscle pulls in my back." TRII 72. His last appointment with a chiropractor was in 1994, and he stated that he had never missed any time from work prior to April 21, 1998 due to his back. TRII 73. He stated that his back was "fine" before the accident, although he acknowledged getting "sore" from work, and he denied that he had ever limited his activities at work prior to April 21, 1998 due to his back condition. TRII 73-74.

In 1999, the Claimant was assaulted by a logger who was working near the Claimant's home. According to the Claimant, he told the logger, who was operating a hydraulic log cutter, not to place cut logs on his property, and the logger responded by striking the Claimant's right leg with a log, leaving a scar approximately three and one half inches in length and one inch in width on the inside of his right ankle. TRII 77-79, 139-45. The Claimant testified that this incident occurred prior to his examination by Dr. D'Alton and that the injury to his ankle was still healing at the time. TRII 79-80. He stated that Dr. D'Alton specifically examined the scar and "put his tools right in it." TRII 79. He said that he did not injure his back in this incident, adding that his foot hurt so much that he was not aware of any other pain. TRII 140, 144.

Regarding the current condition of his back, the Claimant testified that he continues to wear the two braces prescribed by Dr. Doppelt. He puts on the elastic brace as soon as he gets out of bed in the morning, and he uses the aluminum brace whenever he engages in activity such as mowing his lawn. TRII 75-77. He stated he still experiences daily back pain, not as severe as it was in the past, which is aggravated by activities such as bending, raking or mowing his lawn,

sitting, bending forward to read or to iron a shirt. TRII 80-82. He takes pain (Ultram) and sleep (Ambient) medications which are prescribed by Dr. Doppelt as well as ibuprofen and aspirin. TRII 82. He doubles the pain medication and aspirin dosage if he is active. TRII 83-84. He stated that his pain leveled off after the April 21, 1998 accident and has been stable since that time, permitting him to learn to live with his limitations. TRII 91.

A typical day for the Claimant begins with breakfast with his wife followed by a short walk. He then reads for one to three hours, after which he may try to do some work in his yard. TRII 84-85. He receives help with household tasks from two grandsons, aged 14 and 16 at the time of the second hearing, and he passes the rest of the day with activities such as fishing at a pond near his home with his grandchildren. TRII 85. He eats supper with his wife, watches the evening news on television and then goes to bed, sometimes remaining awake until 1:00 a.m. or 2:00 a.m. because he can not sleep due to back pain. TRII 85-86.

The Claimant stated that he has always held a Massachusetts sportsman's license (EX 4) which he has continued to keep current so that he and his grandchildren can fish. TRII 86. He said that physical activity increases his back pain, the increased pain following activity will last for a day or two when he spends a lot of time lying down, and that walking seems to "minimize" the pain as long as he doesn't walk to far. TRII 88-90. He tries to walk slowly every day for about 20 to 30 minutes at a time. TRII 90. He stated that he had declined back surgery and currently has no plans for future surgery because there was no guarantee that surgery would improve his condition, and it could make things worse. TRII 91-92. At the present time, he obtains relief from his back pain by walking, lying down or sitting in a soft chair. TRII 93. Because physical activity increases his back pain, the Claimant said that he has tried to limit his activities, particularly to the morning hours which is his best time of the day. If he does engage in activity such as bending or mowing his lawn, he experiences an increase in back pain to the point where he is "paralyzed" and must lie down for relief. TRII 93-94. He also stated that sitting in a hard chair such as the witness chair in the courtroom increases his back pain. TRII 94. He can carry plastic grocery bags and said that four one gallon water jugs is the heaviest load that he has carried since April 21, 1998. TRII 95. He thought that he could climb a ladder slowly, but said that he has had to use his grandchildren to mow and rake his yard. TRII 95-96.

The Claimant testified that he has hired contractors to work on his house, and he acknowledges that he has done some work around the house such as throwing out "stuff" that had been knocked down by the contractors. TRII 96. He was questioned about the activities depicted on the surveillance videotape taken in February 2000 (EX 2A), and he stated that a retaining wall at his home had collapsed so that he and his wife had to move some items out of harm's way. TRII 97. He said that he pushed a lawn mower out of the way and lifted a canvas barbeque grill cover and some small barbells which belong to his daughter and weigh between seven and twelve pounds. TRII 97-98. He was wearing the aluminum back brace underneath his clothes while he did this work. TRII 98. He also stated that he has mowed his lawn, raked leaves and pushed snow since April 21, 1998 and said that all of these activities made his back sore. TRII 105.

The Claimant has not worked or looked for work since April 21, 1998. He stated that he could not perform his former job as a pile driver superintendent because he could not do the walking, lifting, climbing and jumping onto barges required by the position, nor could he react quickly to help other workers in the event of an emergency. TRII 99-100. He testified that there was no part-time or light duty work available for a pile driver superintendent. TRII 100. The Claimant further testified that he had worked inside the Employer's office during the winter months of 1997-1998 until about a week before April 21, 1998 when outside work resumed. His work in the office was performed at a desk and involved review of blueprints and construction specifications to prepare bids. TRII 101. He said that he could not concentrate sufficiently do this type of work now, noting that he has difficulty recalling material that he has read and that two hours is about the longest time he can endure sitting. TRII 102.

Under cross-examination, the Claimant testified that he had taken Prozac for two or three years prior to April 21, 1998 for depression, but he stated that his concentration was not affected by the medication. TRII 106-108. He was not sure whether depression affected his concentration. TRII 107. He acknowledged that he had worked in the construction industry for 35 years at the time of the accident and had done a lot of heavy lifting in excess of 100 pounds over the years as it was part of his responsibility to help out on the job site. TRII 108-109.[5] He also acknowledged that he had gone to see chiropractors 21 times before the April 21, 1998 accident. TRII 113. However, he denied that he had ever worn a back brace prior to the accident, and he maintained that a statement in the Jordan Hospital records (EX 12) that he had benefitted from the use of a back brace in the past was in error as he never made any statement to the hospital about wearing a back brace. TRII 113-115. The Claimant admitted that he had not told Dr. Doppelt about his prior chiropractic treatment and that he indicated on a form he completed for Dr. Doppelt that he had not previously injured his back. TRII 115-119. He explained that he did not consider a "muscle pull" to be significant or "relevant at that time." TRII 120. On redirect, he testified that most of the chiropractors that he had seen in the past attributed his symptoms to pulled muscles. TRII 150.

The Claimant further acknowledged that he announced his retirement at a company Christmas party in December 1997. TRII 121. He testified that he was going to go to work "inside" for the Employer which would allow him to reduce his work hours from 70 to 50 per week, and he denied that he had not looked for work since the April 21, 1998 accident because he had retired. TRII 122-24. He has an unlimited crane operator's license which he has kept up to date at an annual cost of $35.00, but he has not sought work as a crane operator because such work is outside the jurisdiction of his union. TRII 125-26. On redirect, he testified that he could

[5] Much ado was made at the hearing over whether the Claimant had previously testified at a deposition that he had lifted 500 pounds. The Claimant testified that he could bench press 240 pounds and may have "tried" to lift as much as 500 pounds. TR II 109-13, 151. There is, however, no dispute that the Claimant's 35 years in the construction industry consistently entailed heavy lifting and physical exertion.

no longer operate a crane safely, and he explained that he was a member of Local 56 which represents pile drivers, while Local 4 represents crane operators. TRII 149-50.

He testified that he fishes for about 30 minutes at a time at a pond adjacent to his back yard, casting the line from a seated position, or occasionally while standing. TRII 128-31. He stated that he owns five hunting bows which he can still draw, but he has not hunted for the past ten years as he has maintained his sportsman's license for fishing only. TRII 132-33, 148. He stated that he has not obtained a fishing license in lieu of the sportsman's licence, which allows him to hunt as well as fish, because he's "always had one" and because the proceeds from the sportsman's license are used to support wildlife programs. TRII 135-36. The Claimant testified that he joined the Plymouth Rod and Gun Club in December 2000 and goes there about twice a week with his grandchildren who participate in a youth training program, using his .22 caliber Smith and Wesson pistol. TRII 134-35.

Although he was wearing only the elastic back brace at the second hearing, in contrast to the aluminum brace he wore to the hearing before Judge Jansen in August 1999, the Claimant stated that his back condition at the time of the second hearing was the same as it had been two years earlier in August 1999. TRII 145-47.

B. Videotape Surveillance Evidence and Testimony of Investigator Cory Porter

Mr. Porter testified that he has about four year's experience as a private investigator and has conducted surveillance for clients hundreds of times. TRII 171-72. He conducted surveillance of the Claimant, and as discussed above, the videotapes he compiled during this surveillance have been admitted into evidence as EX 1, 2A, 2B and 3. Mr. Porter testified that on the first videotape, taken in November 1998 (EX 1), he observed the Claimant carrying a bow at a shopping plaza where a sporting goods shop is located. TRII 175-76. This videotape also shows the Claimant bending to get in and out of a motor vehicle.

The next videotape was taken on February 8, 2000. Mr. Porter testified that he filmed the Claimant through the windows of a vehicle which he used to "cover" his position while the Claimant pushed a shopping cart and unloaded groceries from the cart into the passenger side of a vehicle driven by the Claimant's wife. TRII 177-78. This videotape shows the Claimant pushing a shopping cart and transferring bags from the cart into a motor vehicle. EX 3.

Regarding the last in the series of videotapes (EX 2A and 2B), Mr. Porter testified that the surveillance depicted therein was conducted in the vicinity of the Claimant's residence on February 10, 2000, that he observed the Claimant present on the premises, that he heard hammering at the Claimant's house and that he did not observe any other vehicles or people on the premises. TRII at 185-86. This videotape shows the Claimant in and around his home in a variety of activities including carrying and throwing what appear to be small pieces of wood and debris into the bed of a pickup truck, pushing a lawnmower, coiling a garden hose, picking up barbells, putting up a sign, lifting a bar over his head and placing the bar onto a deck, pressing a fence rod into the ground, carrying a table and climbing a set of stairs. EX 2A. On this tape, the

Claimant is seen to be bending several times and reaching over his head. His movements are slow and deliberate but do not appear to be significantly limited by pain or discomfort.

On cross-examination, Mr. Porter stated that he was approximately 700 feet away from the Claimant's house while he was taping. He also stated that he did not see any hammering, that he was at the Claimant's residence for about five hours on the date the videotape was compiled and that the Claimant was only within his view for about 45 minutes. TR II at 186-87. Mr. Porter further testified that his firm had conducted approximately 80 to 90 hours of surveillance of the Claimant over at two to three month period in late 1999 to early 2000, resulting in three segments of videotape actually showing the Claimant for a total of approximately 40 minutes. TR II 191-92. On redirect examination, Mr. Porter stated that the Claimant lives in a secluded area which made it difficult to capture the Claimant on videotape with the exception of the one occasion that he went outside the residence. TRII 192-93.

C. Medical Evidence

Much of the medical evidence in the record was introduced before Judge Jansen who made the following findings:

> On March 27, 1999, Dr. Samuel H. Doppelt summarized his findings with respect to Claimant's condition. (CX 1). He examined Claimant on six occasions from May of 1998 to January of 1999. He noted that Claimant did not have any previous back injuries. Dr. Doppelt opined that Claimant suffered acute hyper flexion injury to his lumbar spine resulting in lumbar strain and injuries to his facet joint resulting in inflammation and arthritic changes at the L4-L5 level. He opined that these injuries were caused by Claimant's workplace accident and that Claimant is completely disabled from any type of employment. Dr. Doppelt stated that Claimant is not yet at a medical end point, but that it is unlikely that he will ever be able to return to work. He opined that surgical intervention may become necessary eventually. Dr. Doppelt's Curriculum Vitae is not in the record, but his letterhead indicates that he is an orthopaedic surgeon who is associated with Harvard Medical School, Massachusetts General Hospital, and The Cambridge Hospital.
>
> Drs. Hamid Salamipour and Alan J. Fischman interpreted a bone scan of Claimant's spine on November 12, 1998. (CX 1 at 5). Their findings were consistent with degenerative changes at the L4-5 facet joint. The record does not contain the qualifications of Drs. Salamipour or Fischman.
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> Dr. Edwin T. Wyman examined Claimant on June 25, 1998. (EX 1). He noted that Claimant did not have any difficulty with his lower back prior to the accident on April 21, 1998. He opined that Claimant had a crush injury to his lumbar spine and abdomen related to the incident of April 21 and stated that conservative treatment and physical therapy should improve Claimant's condition.

At the time of the examination, Dr. Wyman opined that Claimant was unable to work and would remain unable to work for "at least six weeks." He also opined that Claimant would not have any permanent partial impairment of function. Dr. Wyman's Curriculum Vitae is not in the record, but his letterhead indicates that he is an orthopaedic surgeon associated with Massachusetts General Hospital.

Dr. Manoucher Shirazi examined Claimant on March 31, 1999. (EX 2). He diagnosed crushing injury, aggravation of pre-existing degenerative arthritis of the cervical spine, muscle strain, and aggravation of pre-existing degenerative arthritis of the lumbar spine. He opined that Claimant's present condition is due to a combination of his injury and the aggravation of pre-existing conditions. Dr. Shirazi stated that Claimant is not at an end result. He opined that Claimant is unable to work as a construction worker, but could work a sedentary job that does not require repetitive bending of the back or lifting of objects weighing over twenty-five pounds. Dr. Shirazi's letterhead indicates that he is Board Certified in Orthopedic Surgery.

Dr. Ronald P. Goldberg conducted radiological examinations of Claimant's spine on April 21, 1998. (EX 4). He found slight scoliosis convex right and small spurs. He observed no fracture. Dr. Goldberg's qualifications are not in the record.

The Jordan Hospital records contain a variety of medical records pertaining to a number of separate procedures involving the Claimant. (EPHX 1) Most of these records do not pertain to the Claimant's back injury. My factual findings here will relate only to those records related to the miner's back condition.

EPHX 1 contains what appears to be a prescription provided by Dr. Samuel H. Doppelt. It is dated May 29, 1998 which would have been over a month subsequent to the date of the incident. Most of the prescription writing is illegible to me, and therefore, I can make no findings. One item appears to be a brace. The exhibit also includes a Jordan Hospital form indicating that the Claimant had physical therapy as a result of an injury suffered at work on April 21, 1998. The therapy form was signed by a physical therapist on April 21, 1998. The form indicates that the Claimant was injured at work on April 21, 1998 and that he was given a back brace. It notes his pain level as being eight on a scale of ten and that his functional mobility was limited significantly. His therapy session lasted fifteen minutes. It also notes his physician as being Dr. Doppelt.

EPHX 1 also includes an emergency room report dated April 21, 1998 and noting that the Claimant visited the hospital because of right leg/hip and back injury. The handwritten notations on this form are essentially unreadable although I can note that the physician's examination notes back pain. A second entry dated April 28, 1998 indicates that the Claimant appeared at the Emergency Room in a

private car and complained of a back injury when he was squashed between a pier and a tire. It appears that his behavior was aggressive. Apparently the Claimant advised hospital personnel that he was taking prozac.

The same exhibit also includes a typewritten Jordan Hospital diagnostic imaging report. Apparently x-rays were taken of the cervical spine, lumbar spine, and thoracic spine. The lateral view of the cervical spine disclosed degenerative changes but no fracture was seen. Other cervical spine readings disclosed degenerative changes but no fracture. The lumbar spine impression showed degenerative changes but no fracture. The thoracic spine impressions showed slight scoliosis convex right and small spurs. No fractures seen. These impressions were read by Dr. Ronald P. Goldberg and were all made on April 21, 1998.

Other portions of EPHX 1 disclosed a sinus problem, ear pain which the Claimant thought was related to his jaw being out of joint, a prostate nodule for which surgery was performed in 1990, an Emergency Room visit in November of 1988 due to painful ears, sinus, chest congestion, and a consultation report made in January of 1984 when Mr. Kenny was treated as an outpatient for chest pain. None of this evidence is pertinent to this case.

Dr. Samuel Doppelt examined the Claimant on July 22, 1998 at the Cambridge Hospital. (EPHX 2) The record of that visit notes that he was seen as a followup for lumbar pain. Prescription drugs had been previously given to the Claimant which caused gastrointestinal problems. Dr. Doppelt noted that the Claimant had shown some improvement but that he was still quite uncomfortable. He notes significant change in his life style, and that he had not been able to return to work. He does do some walking but has considerable difficulty changing positions, lying down, sitting up etc. Straight leg raising to about 60 degrees produces pain in his back but not down his legs. He does have muscle spasm and has limited flexion in his lateral bending. Dr. Doppelt recommended that he be given a prescription for ibuprofen and that he will continue with a back brace and limit his activities. Dr. Doppelt also notes that "I think he is going to be in a rather long convalescence."

The Cambridge Hospital records also disclose that a radiologic consultation took place on January 13, 1999. (EPHX 2) That resulted in the impression of degenerative changes of the L4-L5 facet joints on the right with protective bony spurring about the joint. There is also mild narrowing of the facet joint on the left. There are mild productive degenerative changes of the facet joints at L5-S1 level. There also is a vacuum disc phenomenon involving the L5-S1 disc. The spinal canal is minimumly narrowed at the L4-L5 level from degenerative spur formation. The paravertebral soft tissues appear normal. Dr. Gregory Harrington read the x-ray film.

> The post-hearing submissions made by Employer also included a one-page statement of updated notes made by Dr. Doppelt. (EPHX 3) The notes seem to indicate that on December 14, 1998, January 29, 1999, May 14, 1999 and July 16, 1999, that Dr. Doppelt saw the Claimant concerning a back pain condition. Most of the writing on Dr. Doppelt's record is illegible.

Decision and Order at 5-8 (quotation marks in original). Summarized below is the additional medical evidence introduced by the parties at the second hearing.

1. Chiropractic Records

Records offered by the Employer show that the Claimant was seen by three chiropractors between 1982 and 1994. EX 9-11. The Claimant first saw Dr. Brian T. Whitfield on August 27, 1982, at which time Dr. Whitfield's notes reflect that the Claimant stated that he had been injured at work on August 17, 1982 when he felt pain in his neck and lower back while lifting a heavy object. EX 9 at 3. After four visits, the Claimant was described as feeling much better with back and neck exercises. *Id*. Over the next five years between August 1982 and October 1987, the Claimant saw Dr. Whitfield for chiropractic manipulations on a total of 22 occasions, mostly for complaints of neck and leg pain. During 1989, the Claimant received chiropractic treatment for back pain on 12 occasions from Dr. John C. Truex. EX 10. Finally, in May and June 1994, the Claimant was seen twice for chiropractic treatment by Dr. David W. Leaf for complaints of deep low back and buttock pain made worse by moving or sitting. EX 11.

2. Jordan Hospital Records

As Judge Jansen found, the Employer introduced records from the Jordan Hospital regarding the Claimant's treatment following the April 21, 1998 accident. One of the items introduced was a form from the physical therapy department dated April 21, 1998. This form which, is signed by a physical therapist, indicates that the Claimant was referred by Dr. Doppelt to be fitted for a "warm & form back brace." EX 12 at 11. This record also states next to the heading "Medical/Social Hx" that "Pt has benefitted from back brace in the past." *Id.* The Claimant, who denies that he ever wore a back brace before the April 21, 1998 accident or that he ever told anyone at Jordan Hospital that he did, introduced an outpatient physical therapy registration form which is dated May 29, 1998, thus suggesting that the April 21, 1998 date is in error. CX 7. The Claimant additionally introduced Dr. Doppelt's prescription for the back brace which is dated May 29, 1998. CX 6.

The additional Jordan Hospital records also reflect that the Claimant was seen on October 18, 1999 when he arrived by ambulance at the emergency room and reported that his right leg had been crushed by a log held by a tree-cutting machine. EX 12 at 2-9. The Claimant reportedly denied any neck pain, back pain or other symptoms other than those related to the leg injury. *Id*. at 7. An x-ray was negative for fracture or other abnormality, and the Claimant was discharged with a diagnosis of contusion and abrasion to the right leg. *Id*. at 8-9.

4. South Shore Medical Center Records

Records from this facility indicate that the Claimant has been seen since 1973 by several different physicians. EX 24. Aside from some references to diffuse muscular pains in 1996 which appear to have been attributed to Lyme Disease, theses records contain no complaints of low back or neck pain prior to April 21, 1998. For that matter, there are no references to any low back or neck complaints after April 21, 1998 either.

5. Additional Medical Records and Testimony of Samuel H. Doppelt, M.D.

Dr. Doppelt reexamined the Claimant on March 27, 2000, at which time he noted that the Claimant still had "significant paraspinous muscle spasm . . . [and] difficulty sitting up, twisting and lying down and flexing from the standing position." CX 3 at 8. He stated that it remained his opinion that the Claimant would benefit from steroid injections into the facets bilaterally at L4-L5, and he concluded with the following comment apparently directed to the Carrier: "Perhaps the Utilization review people will consider the patient's symptoms and physical findings rather than a book." *Id.* at 9.

When Dr. Doppelt next saw the Claimant on June 12, 2000, he reported that the Claimant had obtained some relief from three CT-guided steroid injections and from wearing the back braces. On physical examination, Dr. Doppelt reported that the Claimant still had some paraspinous muscle spasm as well as mild tenderness to palpation in the mid-lumbar and lower lumbar regions. He recommended that the Claimant continue with "modified activities" and using a back brace, and he provided the Claimant with an additional analgesic prescription for Ultram. *Id.* at 11. Dr. Doppelt saw the Claimant again in July 2000, and his last examination report is dated October 30, 2000. At the time of the October visit, Dr. Doppelt stated that the Claimant reported wearing a brace nearly all of the time and that his symptoms generally persisted, although some days were better than others. On physical examination, Dr. Doppelt found that the Claimant had limited trunk mobility associated with pain on attempted flexion or lateral bending. He reported that his neurological examination was normal, that straight leg raising done slowly was normal to about 75 degrees and that there was still some paraspinous muscle spasm. Dr. Doppelt's diagnosis was (1) status post acute hyperflexion injury to the lumbar spine with resultant lumbar sprain and (2) facet arthropathy, bilaterally at L4-L5, secondary to the hyperflexion injury, and his recommendation for future treatment was repeat steroid injections or surgical fusion of L4-L5 or, possibly, L4-S1. *Id.* at 12.

Dr. Doppelt testified at a pre-trial deposition on December 13, 2000 and at the jury trial on April 18, 2001 in the Claimant's third party lawsuit, and the transcripts of his testimony have now been added to the record in this matter. CX 8 & 9. He testified that he is board-certified in orthopedic surgery and is an assistant professor of orthopedic surgery and medicine at the Harvard Medical School. CX9 at 51-52. In his initial examination, Dr. Doppelt found that the Claimant had "a lot of muscle spasm" in the lumbar spine, and he described muscle spasm as an objective finding which can not really be faked. CX9 at 59-60. He stated that the Claimant has always presented for examination with lumbar muscle spasm and limited mobility of the trunk.

CX8 at 19-20, 25, 36. Dr. Doppelt also reviewed the x-rays that had been taken at the Jordan Hospital on April 21, 1998 (CX3), and he stated that the pertinent findings were mild narrowing at L3-4, moderate disc space narrowing at L5-S1 with an air vacuum phenomenon indicative of disc degeneration, and minimal facet joint arthrosis at L5-S1. CX 9 at 55-58, 95. Dr. Doppelt explained that the facet joint is the point where the intervertebral discs interlock and that arthrosis is another term for arthritis. CX 9 at 56, 58. He also stated that facet arthropathy is arthritis and inflammation in the facet joints. CX 8 at 17-18.

Dr. Doppelt further testified that the Claimant told him that he had been working at a physically demanding job all of his life and had "aches and pains" but no "specific" or "significant" back injuries in the past, though he did indicate that he had previously taken anti-inflammatory medication and seen a chiropractor. CX 8 at 9; CX 9 at 80. Dr. Doppelt was questioned at length as to whether specific information about the Claimant's past reported history of back and neck pain related to workplace incidents would have been significant to him. He responded that it is important for a physician to get an accurate medical history from a patient, but he stated that the Claimant's omission of details regarding his past history of back pain and chiropractic treatment was not "particularly relevant to his current injury" because he had been "basically asymptomatic immediately prior to this injury and had been doing very physically demanding work." CX 8 at 9-10; CX 9 at 81-85, 89-91. He also testified that he did not consider it significant that the Claimant had announced his retirement in December 1997. CX 9 at 86.

The initial treatment plan prescribed by Dr. Doppelt consisted of muscle relaxant and anti-inflammatory medication which he said did not help very much. CX 9 at 62, 67. In November 1998, He ordered a bone scan (CX 4) which showed right facet degenerative joint disease at the L4-5 level. CX 9 at 64-66, 71-72. Dr. Doppelt testified that he next decided to have the Claimant undergo a CT-guided steroid injection in an effort to treat inflammation at the L4-5 facet joint but testified that the injections did not provide the Claimant with lasting relief. CX 9 at 67-70. He said that the CT-guided injections were both diagnostic and therapeutic: "It's diagnostic in that you have somebody that has a lot of pain, you inject this one spot and his pain gets markedly better; ergo, that's the offending agent. It's also therapeutic, and sometimes they can have more prolonged relief." CX 9 at 68. He also stated that he considered the injections to be medical tests to determine that the facet joint injury was causally related to the Claimant's April 21, 1998 accident. CX 8 at 21. Dr. Doppelt testified that the CT scan film (CX 5) showed that the L4-5 facet joint was damaged and that the facets at the other disc levels were "pretty much normal." CX 9 at 72-74.

Dr. Doppelt was asked to provide his final diagnosis for the Claimant, and he testified that he felt that the Claimant had sustained a hyperflexion injury to his spine when he was forced into a "pike" position[6] which caused muscle and ligamentous strain and an injury to the facet joints. CX

[6] The trial transcript erroneously reflects that Dr. Doppelt referred to a "peg" position when it is clear from his March 27, 1999 report that he characterized the Claimant's position after he had been forced into a markedly flexed position as "similar to a diver doing 'a pike position'".

9 at 75. He stated that the facet joint injury involved a disruption of the tissue capsule surrounding the facet joint which, in turn, caused an arthritic process where the Claimant suffered a loss of cartilage resulting in the Claimant rubbing "bone on bone" whenever he moves. *Id.* Dr. Doppelt stated that he based this diagnosis on multiple factors: (1) the fact that, aside from some occasional back complaints in the past, the Claimant was asymptomatic and doing very strenuous work prior to the April 21, 1998 injury; (2) the Claimant then suffered an acute injury with severe pain, muscle spasm and abnormality on the bone scan but no evidence of a herniated disc; and (3) the Claimant responded to the steroid injections which are both diagnostic and therapeutic. CX 9 at 75-76. Dr. Doppelt further stated that it was his opinion to a reasonable degree of medical certainty that the Claimant's diagnosis is causally related to the April 21, 1998 accident based on the fact that he was relatively asymptomatic prior to the accident and experienced an acute onset of pain immediately after the accident, and because the radiographic studies and diagnostic tests all confirmed that the Claimant's pathology is related to this area. CX 9 at 76-77.

Dr. Doppelt testified it is his opinion that the Claimant is unemployable since he could never go back to his former work which was physically demanding with requirements for lifting, bending, twisting and climbing, and since he can not sit long enough to do more sedentary work. He stated that, initially, the Claimant was very adamant about returning to work and that it was his hope that this would happen, but "as time evolved, it's clear that's not in the cards." CX 9 at 77. Regarding the Claimant's prognosis, Dr. Doppelt testified,

> I think his prognosis is fair to poor, actually. I think he is left with the following choice. He either lives with what he has and gets by, or he says, Okay, I'll have a back operation, which requires a back fusion in which you fuse the 4-5 level and possibly 4-5 and S1. And what that means is that you would have to probably put in what's called pedical screws, screws and rods and bone grafts. And that's a big operation. If you could remove the motion at the facet that's pathological, if you can remove that motion, there's a good chance you can get rid of the pain or improve -- maybe not completely but improve it. But then again it's a big operation, and whenever you're talking about back surgery, you're not in any position to make guaranties. So those are basically his two choices.

CX 9 at 78. Dr. Doppelt also stated that he believed that the Claimant was at a point of medical end result. CX 8 at 40.

6. Supplemental Report and Testimony of Edwin T. Wyman, Jr., M.D.

Dr. Wyman submitted a supplemental report dated April 3, 2001 to the Employer after reviewing the Claimant's more recent medical records and the surveillance videotapes. After reviewing this information, Dr. Wyman offered the following commentary:

CX 4 at 1 (internal quotation marks in original).

> From these more recent records and videotapes since my report of June 25, 1998, it is now my opinion that the injury of April 21, 1998 caused a soft tissue lumbar strain which, because of preexisting degenerative changes, would require four to six months to recover. This injury may have aggravated the degenerative changes slightly as well. This, however, depends entirely upon the subjective reporting of symptoms on the part of the claimant, since there are no objectively positive physical findings or imaging findings which would clearly show progression of the degenerative changes following the injury of 1998. Certainly his videotape recordings show normal activities and no limitations for the claimant at least on a short term basis. I do not feel that he should have any surgical procedure.
>
> In my opinion, the claimant has long since reached a point of maximum medical improvement in regards to his back and he is able to carry out occupational activities which do not require a lot of stooping, bending, lifting or climbing. In my opinion, he can work as a supervisor in pile driving within these limited boundaries.

EX 15 at 3. The Employer took Dr. Wyman's testimony at a videotaped deposition on July 24, 2001. EX 6. Dr. Wyman is a board-certified orthopedic surgeon who has been in practice since 1963. *Id*. at 9-10. He stopped his surgical practice in 1996 and currently does "independent medical examinations" one day per week. *Id*. at 75.

Dr. Wyman testified that at his June 25, 1998 examination, the Claimant had inconsistent neurological findings or Waddel's signs which led him to discount the findings in making a diagnosis. *Id*. at 21-22. He stated that the Claimant had told him that he had no trouble with his back until the April 21, 1998 accident and that obtaining an accurate history is important, especially in a case such as this where he did not have any of the Claimant's past medical records. *Id*. at 22-23. Dr. Wyman reviewed the x-rays taken on April 21, 1998 and stated that the films showed degenerative changes at L3-L4, facet joint arthrosis at L5-S1, an air vacuum phenomenon indicative of disc degeneration, and slight thoracic scoliosis and degenerative changes, all of which he said pre-existed the April 21, 1998 accident. *Id*. at 36-37. He also reviewed the CT scan films and stated that they showed degenerative changes of the L4-L5 facet joints which, in his opinion, were pre-existing on April 21, 1998. *Id*. at 39-40. Dr. Wyman testified that the Claimant's current complaints, as he understood them, are consistent with these pre-existing degenerative changes. *Id*. at 40-41.

Dr. Wyman further testified that the surveillance videotapes showed the Claimant moving "normally" and without any apparent pain or abnormal back function. *Id*. at 45-46, 48-50.[7] He

[7] The Claimant objected and moved to strike Dr. Wyman's testimony that the Claimant's movements on the surveillance videotapes appeared normal and not indicative of back abnormality as inappropriate for expert opinion because such observations are not "beyond the ken of the

explained that it was now his opinion that the Claimant suffered a soft tissue lumbar strain as a result of the April 21, 1998 accident which, because of the pre-existing degenerative spine changes, would take twice as long to resolve than would be the case in the absence of the pre-existing conditions. *Id*. at 52-53. Dr. Wyman added that there was no objective evidence that the Claimant had suffered a lumbar strain, and it was his opinion that any lumbar strain injury would have healed by the time of the deposition. *Id*. at 53. Dr. Wyman was next asked about Dr. Doppelt's diagnosis of facet arthropathy, and he agreed that the Jordan Hospital records from April 21, 1998 showed signs that the Claimant suffered from facet arthropathy. *Id*. at 54-56. He also stated that, absent objective evidence of trauma such as a fracture which was not present in this case, it was not possible to opine to a reasonable degree of medical certainty whether the Claimant's facet arthropathy was caused by trauma or pre-existing degenerative disease. *Id*. at 56. Dr. Wyman stated that facet arthropathy can cause pain, and it was his opinion that the arthritic changes in the Claimant's back predated the facet arthropathy. *Id*. at 61. He further stated that it was his opinion to a reasonable degree of medical certainty that the Claimant's current condition is not related to the April 21, 1998 accident. *Id*. at 61-62.

On cross-examination, Dr. Wyman stated that there is a controversy in the medical profession as to whether muscle spasm is objective or subjective and whether an examiner can determine whether a muscle spasm is voluntary or involuntary. He placed himself among the ranks of those who believe that they can distinguish between voluntary and involuntary muscle spasm by holding a hand on the muscle and seeing whether the spasm is consistent or intermittent. *Id*. at 78. He was questioned about the significance of the Claimant's past chiropractic treatment and said that he did not find any meaningful information in the chiropractic reports. *Id*. at 82-83. Dr. Wyman commented on the November 12, 1998 bone scan and said that the right facet degeneration shown at L4-L5 was pre-existing for 'several months" at the time of the scan because such changes take several months to register. *Id*. at 84. He had "no opinion" as to whether this condition would have appeared on a bone scan taken prior to April 21, 1998. *Id*. at 84-85. However, he agreed that the x-ray taken at Jordan Hospital on April 21, 1998 did not show the presence of right facet degeneration at L4-L5 while it did show degenerative changes at L5-S1. *Id*. at 86-88. He went on to state that x-ray and bone scan studies are different, and he speculated that a bone scan on April 21, 1998 would have shown ongoing degenerative changes at L3 through S1. *Id*. at 89-91, 112-13. Dr. Wyman also stated that it would be fair to assume that any pre-existing degenerative changes in the Claimant's back were not affecting his ability to perform work, assuming that he had only sought chiropractic care twice between 1989 and 1998 while he was doing heavy work as a construction supervisor. *Id*. at 92-93.

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average layperson." EX 6 at 46, 48-49. I disagree. The testimony of a qualified physician on the question of whether a person's activities are indicative of a physical abnormality or medical condition, in my view, falls withing the realm of scientific knowledge as envisioned by the expert witness rule to assist the trier in evaluating the evidence. 29 C.F.R. §18.702. Accordingly, the Claimant's objection is overruled, and his motion to strike is denied.

Dr. Wyman testified that he knows Dr. Doppelt and considers him to be an excellent orthopedic surgeon. *Id*. at 98. He stated that Dr. Doppelt's diagnosis of a lumbar strain superimposed over degenerative changes at L4-5 and his diagnosis are "basically the same thing." *Id*. at 99. However, he stated that he disagreed with Dr. Doppelt's opinion that the Claimant's current condition is causally related to the April 21, 1998 injury or that he may require spinal fusion surgery at some point in the future. *Id*. at 101-102. He further testified that he had no reason to dispute Dr. Doppelt's finding that the Claimant always had muscle spasm on physical examination, but he stated that he found only moderate, "voluntary" spasm which he attributed to the Claimant "voluntary guarding the back because he was uncomfortable." *Id*. at 102. When questioned about his finding that the Claimant had exhibited inconsistent or positive Waddel's signs during the June 1998 examination, Dr. Wyman agreed that a patient would have to exhibit three out of five Waddel's signs in order for this to be significant, and he acknowledged that Dr. Greenberg, whose examination is cited in his April 3, 2001 supplemental report, only found one positive Waddel's sign. *Id*. at 103-104.[8]

With respect to the Claimant's ability to work, Dr. Wyman testified that he could return to his usual employment as a pile driver superintendent provided that the work is purely supervisory:

> [I] think that he does have something wrong with his back and he cannot be jumping up and down and climbing tires and cranes and so forth. But he can supervise. I mean that's his job description. He's a supervisor. I'm just saying that in practical work probably he has to do a fair amount of climbing and so forth. So if you're asking me can he work as a pile driver supervisor, I'd say, yes, he can, but it's got to be all supervisory, which may be – it may be on paper but it seldom is at the worksite.

Id. at 107. He continued that the Claimant could not do physical activities requiring a "lot of stooping, bending, lifting and climbing." *Id*. at 108. Dr. Wyman stated that he believes that the Claimant has an impairment, but no current disability relating to the April 21, 1998 injury. *Id*. at 109. He did concede that the April 21, 1998 injury may have contributed to the Claimant's impairment to the "slightest" degree, noting that "[w]hat brings on symptoms today that he did not have before is not well understood." *Id*. at 110.

7. Report and Testimony of Joseph G. D'Alton, M.D.

The Claimant was examined on July 27, 2000 by Dr. D'Alton at the request of the Defendants in the Claimant's third party litigation. Dr. D'Alton is board-certified in neurology and psychiatry. EX 19. On physical examination, Dr. D'Alton reported that the Claimant had "an antalgic gait and walked with his right foot inverted, such that he was walking on the lateral, rather than the plantar surface of the right foot." EX 18 at 3. He described the Claimant's gait as

[8] Dr. Greenberg's examination report was not offered in evidence.

"bizarre." Dr. D'Alton reported that the Claimant did not have any muscle spasm and that his neurologic examination was normal. *Id*. Based on the results of his examination and his review of the Claimant's medical records and surveillance videotapes, Dr. D'Alton provided the following impression:

> While Mr. Kenney reports a neck and back injury, on April 21, 1998, no objective signs of trauma were noted when he was assessed at Jordan Hospital.
>
> Mr. Kenny does have some degenerative changes on x~ray of his cervical, thoracic and lumbar spine. These pre-existed his injury. These radiologic abnormalities are common in people of Mr. Kenny's age and are not necessarily associated with symptoms, but can be associated with neck and back pain.
>
> Mr. Kenny currently has no evidence of a lumbar or cervical radiculopathy. The video surveillance tape of February 10, 2000 shows Mr. Kenny carrying out a wide variety of tasks without any apparent discomfort. He was observed to repeatedly bend, lift and reach over his head without difficulty. During the surveillance, his gait appeared normal and he could climb stairs easily.
>
> His examination today shows a gait disorder, which is highly suggestive of exaggeration or malingering.

Id. Dr. D'Alton concluded that there is no objective evidence that the Claimant is either partially or totally disabled and that there is "clear evidence at this time that Mr. Kenny is exaggerating his symptoms and malingering." *Id*. at 3.

Dr. D'Alton testified at the jury trial in the Claimant's third party action, and the transcript of his testimony was introduced at the second hearing in this matter. CX 10. He said that he no longer recommends facet joint injections for his patients in view of a study in the early 1990s which indicated that injections do not provide any long-term benefit. *Id*. at 6-7. Dr. D'Alton stated that he had reviewed the radiology report from Jordan Hospital which showed that the Claimant had multiple degenerative, arthritic changes in the spine which predated the April 21,1998 accident. *Id*. at 9. He reiterated his opinion that the Claimant is neither partially nor totally disabled as a result of the April 21, 1998 accident, and he stated that he did not believe that a back problem could produce the "bizarre" gait that he reportedly observed at the time of his examination. *Id*. at 9-11. Dr. D'Alton explained that he based his opinion on the Claimant's history and medical records, his examination and the "very impressive" surveillance videotapes, nothing that "when I put everything together, there was nothing that made clear sense to me that indicated that Mr. Kenny had either partial or total disability. *Id*. at 12. Dr. D'Alton stated that he formed an opinion that the Claimant was "possibly" malingering because all of the evidence suggested that the Claimant was either "grossly exaggerating" the physical findings or malingering. *Id*. at 13.

On cross-examination, Dr. D'Alton agreed that arthritis is not a neurological condition and that patients with back pain form about five to ten percent of his practice. *Id*. at 14. He also agreed that he would normally ask a patient with a limp why they were limping but did not in the Claimant's case because he "gave him the opportunity to tell me if he had any other health problems." *Id*. at 15-16. Dr. D'Alton testified that he had the Claimant remove his pants and socks during the investigation and that he did not record observing any scars. *Id*. at 16. At this point, the Claimant was brought before Dr. D'Alton in the courtroom, and Dr. D'Alton confirmed the presence of a scar, stating, " I certainly didn't record it if I saw it, but I see it now." *Id*. at 17. Dr. D'Alton further testified that muscle spasm is an objective condition. He was asked again whether he thought the Claimant was malingering, and he responded that "[a]t very best he was markedly exaggerating." *Id*. at 26. Finally, Dr. D'Alton stated that he defined malingering as a situation where some one is pretending to have a problem when he actually is not having a problem, and he said that did not think that the Claimant is pretending to have a problem. *Id*. at 27.

IV. Findings of Fact and Conclusions of Law

The Claimant contends that the issue presented herein is whether he is entitled to permanent total (or permanent partial) disability as of April 18, 2001, stating that "[g]iven that the employer has offered no evidence as to available alternative employment, the only issues to be decided are whether the Claimant has met his burden of proving that he is unable to return to his former job of working pile driver superintendent as a result of an injury suffered at work on April 21, 1998, and whether such disability is permanent." Claimant's Closing Argument at 1. Not surprisingly, the Employer sees things a little differently, asserting that the Claimant had pre-existing degenerative spine conditions after a 35 year work history of heavy physical labor and that his current alleged disability is "solely the result of his pre-existing conditions, which through deception and exaggeration, the [Claimant] is attempting to manipulate to create a funded retirement." Employer/Insurer's Closing Brief at 1, 4. Thus, the issues presented for determination are: (1) whether the Claimant continues to be disabled; (2) if the Claimant continues to be disabled, whether his disability has become permanent; and (3) whether any disability currently suffered by the Claimant is causally related to his employment.

A. Is the Claimant currently disabled?

"Disability" is an "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment . . . ." 33 U.S.C. §902(10). Thus, the concept of disability under the Act is economic as well as medical. *Quick v. Martin*, 397 F.2d 644, 648 (D.C. Cir. 1968). "The degree of disability in any case cannot be measured by physical condition alone, but there must be taken into consideration the injured man's age, his industrial history, and the availability of that type of work which he can do." *American Mutual Ins. Co. of Boston v. Jones*, 426 F.2d 1263, 1265 (D.C. Cir. 1970). Under the Act, the Claimant has the initial burden of proving that he can not return to his usual employment. *Elliott v. C & P Telephone Co.*, 16 BRBS 89, 91 (1984). A claimant's usual employment is defined as the regular duties the claimant was performing at the time of injury. *Ramirez v. Vessel Jeanne Lou, Inc.*, 14

BRBS 689, 693 (1982). To determine whether the Claimant has carried his *prima facie* burden of establishing that he is unable to return to his usual employment, I must compare the medical opinions regarding his physical limitations with the requirements of his usual work as a pile driver superintendent. *Curit v. Bath Iron Works Corp.*, 22 BRBS 100, 103 (1988).

The Claimant testified without contradiction at the first hearing that although he was a superintendent, he worked with his crew and was required to engage in significant physical activities such as climbing and assisting with lifting heavy equipment weighing as much as 125 to 140 pounds. He testified at the second hearing that his back condition today is about the same as it was in 1999, and he did not believe that he could return to work as a pile driver superintendent. The Claimant's testimony is supported by the opinion from his treating orthopedic specialist, Dr. Doppelt, who states that the Claimant can never return to his job as a pile driver superintendent, and Dr. Wyman, the Employer's expert, agrees that the Claimant's limitations due to his back condition would prevent him from performing anything but the purely supervisory aspects of the job. Significantly, Dr. Wyman expressed this opinion after he had viewed the surveillance videotapes. Dr. D'Alton expressed a contrary view, but I have discounted his opinion because it was clearly based his belief that the Claimant is either grossly exaggerating or fabricating his symptoms. In my view, Dr. D'Alton's conclusion that the Claimant is exaggerating or malingering is questionable because it was based on his observation that the Claimant walked with a "bizarre" limp which he viewed as feigned, yet he admittedly departed from his standard practice and never asked the Claimant why he was limping. The problem with this departure from protocol was brought into sharp focus at the trial in the third party action when Dr. D'Alton was confronted with the scar on the Claimant's ankle, a possible explanation for his limp, and later retracted his accusation of malingering. Finally, I have taken the surveillance videotapes and the testimony of the Employer's investigator, Mr. Porter, into consideration. The videotapes do show the Claimant engaged in a variety of physical activities without apparent signs of pain or distress, and Mr. Porter testified that he heard hammering sounds emanating from the Claimant's residence when he observed the Claimant and no other person to be present. However, the Claimant's activities on the videotapes are performed slowly, last no more than a few minutes at a given time and are not inconsistent with his testimony that he does attempt to do some light tasks around the home. More importantly, I find that the Claimant's demonstrated ability to carry a bow, walk across a parking lot, push a grocery cart and load grocery bags into a car driven by his wife, climb a set of stairs, and briefly engage in light cleanup of construction debris and household items around his home do not equate to an ability to perform the type of heavy physical labor that is regularly required of a pile driver superintendent working up to 70 hours a week. Therefore, I conclude that the Claimant has shown by a preponderance of the evidence that he continues to be unable to return to his usual employment.

In view of my finding that the Claimant has established that he is unable to return to his former employment because of a work-related injury, the burden shifts to the Employer to demonstrate the availability of suitable alternative employment or realistic job opportunities which the Claimant is capable of performing and which he could secure if he diligently tried. *Palombo v. Director, OWCP*, 937 F.2d 70, 73 (2nd Cir. 1991); *New Orleans Stevedores v. Turner*, 661 F.2d 1031 (5th Cir. 1981); *Preziosi v. Controlled Industries*, 22 BRBS 468, 471 (1989). In view of

the Claimant's age, limited educational background and work history of labor-intensive work in one industry, and considering the fact that he has a significant medical condition affecting his back, I conclude that the Employer must demonstrate the availability of actual jobs that the Claimant could realistically perform in order to carry its burden in this case. *Cf. Air America, Inc. v. Director, OWCP* (*Air America*), 597 F.2d 773, 779 (1979) (rejecting "a mechanical rule . . . that the employer must always demonstrate the availability of an actual job opportunity whenever a claimant shows an inability to perform his previous work . . . [r]ather it is reasonable to require the employer to make such a strong showing when a claimant's inability to perform any available work seems probable, in light of claimant's physical condition and other circumstances such as claimant's age, education, and work experience . . . [but not] [w]here claimant's medical impairment affects only a specialized skill that is necessary in his former employment . . ."). [9] Here, as the Claimant points out, the Employer has made no showing that there are actual job opportunities that the Claimant is capable of performing and which he could secure if he diligently tried. Absent such a showing, I find that the Claimant has established that he continues to be totally disabled.

B. Has the Claimant's disability become permanent?

"To be considered permanent, a disability need not be 'eternal or everlasting;' it is sufficient that the 'condition has continued for a lengthy period, and it appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period.'" *Air America*, 597 F.2d at 781, quoting *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, 654-55 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). Dr. Doppelt testified at his deposition on December 13, 2000 that the Claimant was as a point of medical end result, and Dr. Wyman concurred in his April 3, 2001 supplemental report that the Claimant had long since reached a point of maximum medical improvement. CX 8 at 40; EX 15 at 3. Although neither physician provides a specific date as to when the Claimant reached a point of maximum medical improvement, I find it reasonable, based on their opinions and the medical records which show that the Claimant completed his last steroid injections in June 2000, to set the date of permanency as July 1, 2000. By that point, the Claimant was 28 months past the date of his injury on April 21, 1998. He was by then no longer receiving any more than conservative treatment, and there is no medical prognosis for any significant future improvement. Therefore, I find that the Claimant's disability became permanent on July 1, 2000 since it had continued for a lengthy period of time and since it appears to be of lasting or indefinite duration.

C. Is the Claimant's permanent total disability causally related to his employment?

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[9] It is noted that the claimant in *Air America* admitted at the hearing before the ALJ that he was capable of performing a desk job but simply hadn't looked for employment. 597 F.2d at 778. *See also Argonaut Ins. Co. v. Director, OWCP*, 646 F.2d 710, 711 (1st Cir. 1981) (noting the intelligence and young age of the claimant, a former longshoreman who was disabled from his regular occupation because of a serious elbow injury, in holding that substantial evidence did not support the ALJ's finding of total disability).

Although Judge Jansen previously found that the Claimant was temporarily totally disabled and that his temporary disability was causally related to the April 21, 1998 injury, he made no finding as to whether the Claimant's current permanent total disability is caused by the work-related injury as the Claimant contends or whether it is solely the product of the Claimant's pre-existing degenerative conditions as argued by the Employer. As this issue had not been previously decided, the law of the case doctrine is inapplicable, and the question of causation must be addressed.[10]

Although the Claimant, as the proponent of an award of benefits, bears the burden of persuasion by a preponderance of the evidence on all facts necessary to his claim; *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 275-76 (1994); he is assisted by the section 20(a) presumption which "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 1082 (D.C. Cir. 1976) (*Swinton*), *cert. denied*, 429 U.S. 820 (1976). A claimant invokes the presumption by making a *prima facie* claim for compensation which "must at least allege an injury that arose in the course of employment as well as out of employment." *U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, OWCP*, 455 U.S. 608, 615 (1982) (*U.S. Industries*). A *prima facie* case is made out when a claimant establishes (1) that he or she sustained physical harm or pain and (2) that an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. *Bath Iron Works v. Brown*, 194 F.3d 1, 4 (1st Cir. 1999) (*Brown*), citing *Ramey v. Stevedoring Servs. of America*, 134 F.3d 954, 959 (9th Cir.1998) and *Susoeff v. San Francisco Stevedoring Co.*, 19 BRBS 149, 151 (1986). *See also Kier v. Bethlehem Steel Corp.*, 16 BRBS 128, 129 (1984); *Kelaita v. Triple A. Machine Shop*, 13 BRBS 326, 331 (1981). Given Judge Jansen's finding that the Claimant's injury and resulting temporary disability arose from the April 21, 1998 work-related injury, the Claimant's testimony that his back condition is about the same today as it was in 1999, and the opinion from Dr. Doppelt that the Claimant's current inability to work is causally related to that same injury, I find that the presumption has been successfully invoked.

Where a claimant invokes the presumption, the party opposing entitlement must produce substantial evidence proving the absence of or severing the presumed connection between such harm and employment or working conditions. *Del Vecchio v. Bowers*, 296 U.S. 280, 286-287 (1935); *Bath Iron Works Corp. v. Director, OWCP*, 109 F.3d 53, 56 (1st Cir. 1997); *Sprague v.*

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[10] The "law of the case" doctrine expresses the general practice of courts, grounded in the strong public policy that there be an end to litigation, to refuse to reopen matters previously decided by the same court. *United States v. United States Smelting Refining & Mining Co.*, 339 U.S. 186, 198 (1950); *Messenger v. Anderson*, 225 U.S. 436, 444 (1912). The doctrine has been followed in cases arising under the Longshore Act unless there has been a change in the underlying factual situation, intervening authority demonstrates that the initial decision was erroneous, or the initial decision was clearly erroneous and allowing it to stand would work a manifest injustice. *Gladney v. Ingalls Shipbuilding, Inc*., 33 BRBS 103, 106 (1999); *Jones v. U.S. Steel Corp*., 25 BRBS 355, 359 (1992).

Director, OWCP, 688 F.2d 862, 865-66 (1st Cir. 1982); *American Grain Trimmers v. Office of Workers' Compensation Programs*, 181 F.3d 810, 815-17 (7th Cir. 1999) (*Grain Trimmers*); *Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 701 (2nd Cir. 1981). The Employer has countered with Dr. Wyman who testified that it is his opinion to a reasonable degree of medical certainty that the Claimant's current back condition is unrelated to the April 21, 1998 injury. Although Dr. Wyman conceded, when pressed on cross-examination, the possibility that the Claimant's work-related injury may have contributed to the Claimant's condition to the "slightest" degree, I find that his acknowledgment of a theoretical possibility does not deprive his opinion of the necessary evidentiary weight to rebut the presumption. *See O'Kelley v. Department of the Army/NAF*, 34 BRBS 39, 41 (2000).[11] Therefore, I find that the Employer has overcome the presumption by the introduction of substantial evidence. Consequently, the presumption "falls out of the case . . . [and] the issue must be resolved upon the whole body of proof pro and con." *Del Vecchio*, 296 U.S. at 286-87; *Travelers Ins. Co. v. Belair*, 412 F.2d 297, 301 n.6 (1st Cir. 1969).

The competing evidence on causation consists of the new opinions from Drs. Doppelt and Wyman and the report from Dr. Shirazi which was introduced at the first hearing before Judge Jansen. All three physicians agree that the Claimant suffered from degenerative arthritis of the spine which pre-existed the April 21, 1998 injury and that the Claimant suffers from some degree of disability. Dr. D'Alton simply concluded that the Claimant was neither totally nor partially disabled, and he did not address the question of causation. As discussed above, Dr. Doppelt concluded that the Claimant sustained a hyperflexion injury to the spine as a result of the April 21, 1998 accident, and he testified that this injury caused an injury to the facet joints as well as muscular and ligamentous strain. He further stated that it was his opinion to a reasonable degree of medical certainty that the Claimant's current disability is causally related to this injury. He based this opinion on the evidence that (1) the Claimant was relatively free of back symptoms prior to April 21, 1998 despite doing heavy physical labor, (2) the fact that the Claimant suffered an acute injury on April 21, 1998 with a sudden onset of pain, (3) the fact that the bone scan and CT scan subsequent to the injury showed damage to the L4-L5 facet joint, and (4) the fact that the Claimant received some relied from the CT-guided steroid injections into the facet joint. Dr. Shirazi, an orthopedic surgeon who did not have the benefit of the more recent test results, similarly concluded that the Claimant's disability is attributable to the April 21, 1998 injury which aggravated his pre-existing degenerative arthritis of the spine. Dr. Wyman concluded that the Claimant suffered a soft tissue lumbar strain as a result of the April 21, 1998 injury which may have slightly aggravated the Claimant's underlying degenerative arthritis and which should have resolved within four to six months. Thus, it was his opinion that any current disability may be attributed solely to the Claimant's pre-existing degenerative arthritis.

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[11] *O'Kelley* was decided under the Eleventh Circuit's standard which requires an employer to produce evidence "ruling out" any causal connection in order to rebut the presumption. *See Brown v. Jacksonville Shipyards*, 893 F.2d 294 (1990). The First Circuit, in which this matter arises, follows the substantial, countervailing evidence rule, and does not require an employer to "rule out" any causal connection. *Bath Iron Works Corp. v. Director, OWCP*, 109 F.3d 53, 56 (1997).

The critical difference between Drs. Doppelt and Wyman lies in their interpretations of the L4-L5 facet joint injury confirmed by the November 1998 bone scan. Dr. Doppelt opined that the April 21, 1998 hyperflexion injury disrupted the tissue capsule surrounding the joint, setting in motion an arthritic process which resulted in a loss of cartilage and a "bone on bone" condition in the Claimant's spine. Dr. Wyman testified that this condition would have existed for "several months" prior to November 1998 which would place the point of injury in the April 1998 time frame. He initially had no opinion as to whether a bone scan on April 21, 1998 would have revealed this condition, but later speculated that a bone scan on April 21, 1998 would have revealed that the Claimant already had ongoing facet joint degeneration from L3 through S1.

In my view, Dr. Doppelt's opinion, which is generally supported by Dr. Shirazi, is better reasoned and more consistent with the objective studies than the contrary opinion offered by Dr. Wyman.[12] Dr. Doppelt provided a detailed and reasonable medical explanation as to why he arrived at the opinion that the Claimant's disability is causally related to the April 21, 1998 traumatic accident. Dr. Wyman's testimony, on the other hand, was somewhat inconsistent on the timing and cause of the L4-L5 facet joint injury. In addition, his general statement that the cause of symptom onset in patients with degenerative spine conditions is not well understood is unpersuasive in this case where the evidence establishes that the Claimant experienced a sudden onset of back pain contemporaneous with the April 21, 1998 accident. Having found for these reasons that Dr. Doppelt's opinion is deserving of greater weight, I conclude that the Claimant has met his burden of proving that his current permanent total disability is causally related to the April 21, 1998 work-related injury.

[12] In finding Dr. Doppelt's opinion better supported by the objective medical studies, it is noted that while Dr. D'Alton questioned the therapeutic value of facet joint injections because a study has shown that they fail to provide patients with long-term relief, nothing in his testimony contradicts Dr. Doppelt's reliance on the injections as a diagnostic tool.

D. Compensation Due and the Employer's Entitlement to Credits

If an employment-related injury contributes to, combines with, or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. *Strachan Shipping v. Nash,* 782 F.2d 513517 (5th Cir. 1986); *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812, 814-15 (9th Cir. 1966). Accordingly, I find that Claimant is entitled to payments of permanent total disability compensation commencing July 1, 2000 and continuing until further order based on the stipulated average weekly wage of $2,378.00.

E. Interest on Unpaid Compensation

Although not specifically authorized in the Act, the Benefits Review Board and the Courts have consistently upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. *Strachan Shipping Co. v. Wedemeyer*, 452 F.2d 1225, 1228-30 (5th Cir.1971); *Quave v. Progress Marine*, 912 F.2d 798, 801 (5th Cir.1990), *rehearing denied* 921 F. 2d 273 (1990), *cert. denied*, 500 U.S. 916 (1991); *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 556 (1978), *aff'd in pertinent part and rev'd on other grounds sub nom. Newport News v. Director, OWCP,* 594 F.2d 986 (4th Cir. 1979); *Santos v. General Dynamics Corp.*, 22 BRBS 226 (1989). Interest is due on all unpaid compensation. *Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78, 84 (1989). Interest is mandatory and can not be waived in a contested case. *Byrum v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 833, 837 (1982); *MacDonald v. Sun Shipbuilding & Dry Dock Co.*, 10 BRBS 734, 735 (1978); *Chandler v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 293, 296 (1978); *Ryan v. McKie Co.*, 1 BRBS 221, 230 (1974). Therefore, I conclude that the Employer is liable for payment of interest on any unpaid compensation.

The appropriate interest rate is the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982) which is periodically changed to reflect the yield on United States Treasury Bills. *Grant v. Portland Stevedoring Company*, 16 BRBS 267, 270 (1984), *modified on reconsideration*, 17 BRBS 20 (1985). My order incorporates 28 U.S.C. §1961 (1982) by reference and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

F. Medical Care

An Employer found liable for the payment of compensation is additionally responsible pursuant to section 7(a) of the Act for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. *Colburn v. General Dynamics Corp.*, 21 BRBS 219, 222 (1988). The Employer has not disputed its liability to provide medical care. Accordingly, I find that the Employer remains liable for all reasonable and necessary medical care as required by the Claimant for treatment of his April 21, 1998 work-related back injury.

G. Attorney's Fees

Having successfully established his right to compensation, the Claimant's attorney is entitled to an award of fees under section 28(a) of the Act. *Lebel v. Bath Iron Works*, 544 F.2d 1112, 1113 (1st Cir. 1976). In my order, I will allow the Claimant's attorney 30 days from the date this Decision and order is filed with the District Director to file a fully supported and fully itemized fee petition as required by 20 C.F.R. §702.132, and the Employer and Carrier will be granted 15 days from the filing of the fee petition to file any objection.

V. ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law and upon the entire record, the following order is entered:

1. The Employer, Cashman/KPA, shall pay to the Claimant, David F. Kenney, permanent and total disability compensation benefits pursuant to 33 U.S.C. §908(a), plus the applicable annual adjustments provided in 33 U.S.C. §910,[13] from July 1, 2000 to the present, and continuing, based on the stipulated average weekly wage of $2,378.00;

2. The Employer shall pay the Claimant interest on any past due compensation benefits at the Treasury Bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid;

3. The Employer shall furnish the Claimant with such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related back injury may require pursuant to 33 U.S.C. §907;

4. The Claimant's attorney shall file, within thirty (30) days of the filing of this Decision and Order in the office of the District Director, a fully supported and fully itemized fee petition, sending a copy thereof to counsel for the Employer who shall then have fifteen (15) days to file any objection; and

[13] Annual adjustments pursuant to section 10(f) of the Act are payable on October 1st of each year once a claimant acquires status of permanent and total disability. *Phillips v. Marine Concrete Structures, Inc.*, 895 F.2d 1033, 1035 (5th Cir. 1990). The Claimant had been permanently and totally disabled since July, 1, 2000.

5. All computations of benefits and other calculations provided for in this Order are subject to verification and adjustment by the District Director.

SO ORDERED.

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DANIEL F. SUTTON
Administrative Law Judge

Boston, Massachusetts
DFS:dmd